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November 18, 2010

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Attention: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission

Re: Comments on Proposed Rules for Shareholder Approval of Executive Compensation and Golden Parachute Compensation, File No. S7-31-10

Ladies and Gentlemen:

We appreciate the opportunity to provide our comments on aspects of the Securities and Exchange Commission's proposed rules for shareholder approval of executive compensation and golden parachute compensation under new Section 14A of the Securities Exchange Act of 1934 (the "Exchange Act"). Our comments focus on to the interplay of several of the proposed rules with common executive compensation practices.

Background

While the philosophies and processes that companies use to evaluate and set executive compensation vary widely, in our experience, one common element among companies is that their executive compensation practices are continually evolving. The changes that occur in executive compensation practices often reflect, among other factors, new business conditions affecting the company, evolving views on compensation among shareholders and other constituencies, and personnel changes within management and the compensation committee. These changes occur even when the company's basic compensation philosophy is not revised in any material way.

Since a company's executive compensation practices are not static, we believe that the proposed rules under new Section 14A should appropriately reflect that reality. There are several provisions of the proposed rules that could be impacted by the continuous evolution of compensation practices at an issuer.

Proposed Amendments to Item 402(b) of Regulation S-K

The proposed amendment to add a new Item 402(b)(1)(vii) would mandate that every CD&A include a description of whether, and if so, how the results of the say-on-pay advisory votes were considered in compensation policies and decisions. While we support inclusion of this topic in the CD&A, we recommend that this disclosure instead be included in Item 402(b)(2) as information that should be addressed depending upon materiality.[1]

There are two primary reasons for this recommendation. First, the mandatory disclosure could inhibit an issuer who receives a high percentage favorable advisory vote from making beneficial changes to its policies. For example, if an issuer receives a substantial majority vote to approve the compensation of its named executive officers, an issuer may nonetheless believe that changes in compensation policies are appropriate and should be made regardless of the approval. If shareholder approval of the issuer's compensation of its named executive officers was not material to the decision to subsequently modify an aspect of its compensation program, the issuer should not be compelled to explain why the change in policy was made despite the favorable vote on executive compensation. Requiring such an explanation would be inconsistent with the existing disclosure principles which require (without consideration of materiality) discussion only of those "core" elements of executive compensation set out in Item 402(b)(1). In many cases, we believe that the advisory vote will be more akin to the items described in 402(b)(2), which are not always core to the compensation setting process but which may have a material impact on the understanding of that process (such as policies for allocating between long-term and annual compensation, how compensation is structured to reflect performance, etc). Furthermore, requiring such disclosure in all cases could create confusion over the advisory nature of the shareholder vote.

Second, because the advisory vote on approval of executive compensation may be general in nature, it may be difficult for an issuer to distinguish changes in compensation policy that are adopted in response to the advisory vote from changes that would otherwise have been adopted. By treating how the issuer considered the results of the vote as an Item 402(b)(2) matter, the issuer would be required to make a disclosure only if the advisory vote were a material consideration in the compensation policy or decisions of the issuer.

Similarly, whether the amendment is made to Item 402(b)(1) or (b)(2), we recommend that the disclosure as to the impact of the advisory vote be limited to those previous advisory votes that were material to decisions on the compensation policies or decisions for the current year.[2] If an issuer makes changes to its compensation practices because of an advisory vote and then receives substantial approval in the next advisory vote, on an ongoing basis, the material advisory vote would be the second vote. There is little benefit to shareholders of having the CD&A contain a history of changes in policies or decisions that were made in response to advisory votes from years past or repetitive statements that no changes have been made because the issuer received substantially favorable votes over many prior years. Furthermore, such a historical record could

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[1] See Request for Comment 7.
[2] See Request for Comment 8. .

detract from a shareholder's understanding of more relevant and material information concerning an issuer's executive compensation.

Proposed Amendment to Rule 14a-8

The proposing release would amend Rule 14a-8(i)(10) to allow the exclusion of a shareholder proposal on say-on-pay advisory votes or the frequency of say-on-pay votes if the company adopts a frequency policy consistent with the plurality of votes cast. We recommend that this amendment be adopted as written.

The proposing release requests comments on whether the exclusion should be available if the issuer has materially changed its compensation program.[3] In our view, the ability to exclude a shareholder proposal on say-on-pay or say-on-frequency should not be affected by changes to the issuer's compensation program. We believe that a carve-out to the exclusion if the issuer has changed its compensation program would deprive the exclusion of much of its force. As discussed above, compensation programs are continually evolving. Even if there were a materiality limitation on the relevant changes, without additional guidance from the Commission, it would be difficult for an issuer to determine whether any particular change is material. In addition, if a material change were made because of a prior say-on-pay advisory vote, there is no rationale for requiring a new frequency advisory vote.

In addition, we do not believe that the frequency advisory vote will be substantially related to a shareholder's approval or non-approval on a say-on-pay advisory vote. The frequency advisory vote would generally reflect a shareholder's stance on the appropriate level of shareholder involvement in corporate governance, which is distinct from the shareholder's stance on the issuer's current compensation policies and decisions. In other words, we believe the say-on-pay advisory vote is a vote on compensation policies and decisions, and the say-on-frequency advisory vote is a vote on the shareholder's view of the appropriate level of shareholder involvement in corporate governance.

Proposed Item 402(t)

As the Commission recognizes in the proposing release, there is substantial overlap between the proposed Item 402(t) disclosure and existing disclosure required under current Item 402(j) relating to payments upon a change in control. The main differences identified by the Commission are that Item 402(t) would require tabular disclosure (which many issuers already voluntarily include under Item 402(j)), would require an identification of the total amount payable, and would require quantification of de minimis perquisite amounts and broad-based employee benefit plans that do not discriminate in favor of executive officers and that are generally available to all salaried employees.

[3] See Request for Comment 21.

We support the Commission's decision not to require issuers to include the proposed Item 402(t) disclosure in the annual proxy, but believe some issuers may be inclined to include the disclosure in the annual proxy anyway, both to respond to potential shareholder expectations as well as potentially to take advantage of the option to eliminate the say-on-golden-parachute vote for golden parachute arrangements previously disclosed and subjected to a regular say-on-pay vote in the annual proxy. We believe the Commission could help facilitate annual disclosure of the Item 402(t) information (for issuers who are inclined to do so) by adopting the same exclusions for de minimis perquisite amounts and broad-based employee benefit plans as apply to executive compensation disclosures in the annual proxy. The rationale for excluding these amounts from the annual proxy (the amounts involved are insignificant and the cost of having to track and calculate the amounts outweighs any benefit of such disclosure to investors) applies in the case of the Item 402(t) disclosure as well. Issuers who do not need to separately calculate these amounts for the Item 402(t) disclosure may be more inclined to include this disclosure in the annual proxy in the format proposed by the Commission.

Proposed Rule 14a-21(c)

As proposed by the Commission, an issuer would not be required to provide for a say-on-golden-parachute vote in a merger proxy to the extent the golden parachute arrangements disclosed in the merger proxy have previously been disclosed (in accordance with proposed Item 402(t)) in the annual proxy and subjected to the regular say-on-pay vote. However this exception is only available to the extent the golden parachute arrangements have not been modified in any way since the regular say-on-pay vote.

We believe the restriction relating to subsequent modifications of golden parachute arrangements as proposed may substantially reduce the benefit to issuers of including the Item 402(t) disclosure in the annual proxy. As noted above, executive compensation arrangements are continuously evolving and this process can include changes to a golden parachute arrangement between the time of the regular say-on-pay vote and the time of a merger or acquisition transaction. If any change to a golden parachute arrangement (regardless of materiality and including a change to reduce the compensation payable) would require the issuer to hold the say-on-golden-parachute anyway, issuers may be less inclined to include the Item 402(t) disclosure in the annual proxy, believing they will be unlikely to be able to take advantage of the say-on-golden-parachute exception if and when the time comes.

To reinforce the exception and facilitate disclosure of the Item 402(t) information in the annual proxy, we recommend Rule 14a-21(c) include a materiality threshold with respect to changes that will take issuers out of the say-on-golden-parachute exception. For example, we recommend that a modification to a golden-parachute arrangement should take an issuer out of the exception only to the extent the modification increases the amount of the golden parachute compensation payable on account of the change in control by a certain threshold amount (e.g. $10,000). We agree with the Commission's position that changes in the amount of golden parachute compensation attributable solely to fluctuations in the issuer's stock price should not take an issuer out of the exception. We further recommend that other similar changes in the amount of golden parachute compensation due solely to changes in the previously disclosed inputs under the arrangement (such as an increase in an executive's base salary, where base salary is an input used to calculate the amount of golden parachute compensation under the previously disclosed terms of the arrangement) should not be treated as modifications for this purpose, either. We would also recommend that the insertion of a new named executive officer not cause an issuer to lose the exception if the amount of the golden parachute compensation payable to the new officer does not exceed the amount payable to the prior officer by more than the threshold amount. Finally we recommend that the Commission adopt its suggestion of not treating subsequent grants of equity awards made in the ordinary course, where the terms of the subsequent awards relating to accelerated vesting on a change in control are the same as the terms of the prior awards, as modifications for this purpose.

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We wish to thank the Commission for the opportunity to submit our comments on the proposed rules. Any questions in relation to our comments may be directed to Steven D. Kittrell in our Washington, D.C. office at (202) 857-1700 or Jeffrey R. Capwell in our Charlotte, N.C. office at 704-373-8999.

Sincerely,

McGUIREWOODS LLP